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## India

### 1. Introduction

*...the process of negotiating, drafting, adopting and enforcing the CRPD has been a relatively quick one. Despite these happy developments, persons with disabilities are continually informed that their expectations from the United Nation system were naïve and unreal.<sup>1</sup>*

How has India fared in realizing the rights of disabled persons under the United Nations Convention on the Rights of Persons with Disabilities ('CRPD')?<sup>2</sup> Have their expectations remained naïve and unreal or has the municipal law grappled with the CRPD to enforce disability rights in a real and meaningful way? This chapter seeks to examine this issue from the standpoint of Indian case law. The purpose is to offer an overview of how the appellate courts in India are using and interpreting the CRPD. In doing so, the chapter does not seek to justify any of the approaches adopted by the courts but performs an explanatory role in understanding the judicial discourse on the CRPD. What emerges from this exercise is a variety of ways in which the CRPD has been invoked—some modest, some substantial, but all useful and unique in understanding the judicial terrain at the crossroads of disability rights, constitutional law and international law.

### 2. Indian Legal System and its Position in International Law

The Constitution of India establishes a dual polity of the Union (Central) Government and Governments of individual States. Article 1 of the Constitution thus proclaims that: 'India is a Union of States'. In assessing the qualitative dimensions of this relationship, the Supreme Court has consistently held that the Constitution adopts only a 'watered down' version

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<sup>1</sup> Amita Dhanda, 'Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disabilities' (2008) 5 Sur International Journal on Human Rights Online <[http://www.scielo.br/scielo.php?pid=S1806-64452008000100003&script=sci\\_arttext&tlng=en#tx04](http://www.scielo.br/scielo.php?pid=S1806-64452008000100003&script=sci_arttext&tlng=en#tx04)> (accessed 10 January 2016) (quoting Andrew Byrnes, 'Convention on Rights of Persons with Disabilities' (1-3 September 2006) presentation made at the Critical Legal Studies Conference at NALSAR University of Law, Hyderabad India.

<sup>2</sup> 999 UNTS 3 (opened for signature 30 March 2007; entered into force 3 May 2008).

of federalism.<sup>3</sup> On the other hand, leading constitutional law scholars like HM Seervai and MP Jain have argued that ‘the federal principle is dominant in our Constitution<sup>4</sup> such that India follows a ‘flexible, federal system and co-operative federalism’.<sup>5</sup> This is because, even though the legislative and executive powers have been elaborately divided between the Union and the States, in the form of the Union List (List I), the State List (List II) and a shared Concurrent List (List III) under the Constitution, the Union maintains some residuary powers in relation to all unenumerated matters (Entry 97, List I; Article 248(1)) and also some overriding powers, especially during emergency and war (Articles 352, 356). In fact, in relation to international law, it is the Union Executive and Legislature which have the exclusive power to enter into international agreements (Articles 73, 246(1) read with Entries 13 and 14 of the Union List) and to bring them into force via Article 253, respectively.

Indian’s position on international law maps closely onto the common law tradition of dualism.<sup>6</sup> This is constitutionally recognized in Article 253 which states that the ‘Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body’. The wording of the provision makes clear that it is only the Parliament, and not the individual States, which has power to implement international law via a domestic enactment, including on matters which are otherwise reserved for individual States to legislate upon.<sup>7</sup> Thus, even though ‘disability’ is an item earmarked for States to legislate upon, the Parliament may rightly legislate upon it when giving effect to international commitments under the CRPD or other

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<sup>3</sup> *West Bengal v India* AIR 1963 SC 1241 (Supreme Court of India); *State of Rajasthan v Union of India* AIR 1977 SC 1382 (Supreme Court of India); *Karnataka v Union of India* AIR 1978 SC 68 (Supreme Court of India). See also KC Wheare, *Federal Government* (4th edn, Oxford Paperbacks 1970).

<sup>4</sup> HM Seervai, *Constitutional Law of India* (4th edn, vol I, NM Tipathi 1991) 303.

<sup>5</sup> MP Jain, *Indian Constitutional Law* (6th edn, LexisNexis Butterworths Wadhwa 2010) 527.

<sup>6</sup> BS Chimni, ‘International Law Scholarship in Post-colonial India: Coping with Dualism’ (2010) 23 *Leiden Journal of International Law* 23.

<sup>7</sup> This is because Article 253 opens as a non-obstante clause: ‘Notwithstanding anything in the foregoing provisions of this Chapter...’ See P Chandrasekhara Rao, *The Indian Constitution and International Law* (BRILL 1993) 7.

international obligations.<sup>8</sup> The dualist effect of Article 253 means that India's obligations arising from an international agreement cannot be enforced in courts until specific legislation is passed by the Parliament bringing into force the obligations arising under the agreement.<sup>9</sup>

But at the same time, Article 51(c) of the Constitution provides that the State shall endeavour to 'foster respect for international law and treaty obligations in the dealings of organized peoples with one another'. Whilst Article 51(c) is merely a 'directive principle' and not a 'fundamental right' such that it cannot be directly enforced in a court of law; directive principles like Article 51(c) are still 'fundamental in the governance of the country' and it is 'the duty of the State to apply these principles in making laws'.<sup>10</sup> Thus, Article 51(c) not only makes the obligation to implement international law under Article 253 a matter of good governance (because it fosters respect for treaty obligations); but it also makes space for asserting respect for international law and treaty obligations generally, over and beyond the Article 253 requirement.<sup>11</sup> This broad interpretation of Article 51(c) has been aided by the fact that directive principles included in Part IV (Articles 36-51) of the Constitution have themselves become vital in the enforcement of rights.<sup>12</sup> The culmination of this trend appears in the *locus classicus* of *Vishaka v State of Rajasthan*.<sup>13</sup> The Supreme Court in *Vishaka* relied on Article 51(c) to hold that the legislative gap in addressing sexual harassment against women in the workplace could be judicially bridged by relying on India's international obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):<sup>14</sup>

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<sup>8</sup> Entry 9, State List, Schedule VII, Constitution of India 1950.

<sup>9</sup> *Civil Rights Vigilance Committee, SLSRC College of Law, Bangalore v Union of India* AIR 1983 Kant 85 (High Court of Karnataka).

<sup>10</sup> Article 37, Constitution of India 1950.

<sup>11</sup> *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225, 333 (Sikri CJ) (Supreme Court of India).

<sup>12</sup> *Francis Coralie v Union Territory of Delhi* AIR 1981 SC 746 (Supreme Court of India); *Peoples Union for Democratic Rights v Union of India* AIR 1982 SC 1473 (Supreme Court of India); *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 (Supreme Court of India); *Chemeli Singh v State of UP* 1996(2) SCC 549 (Supreme Court of India); *Paschim Banga Khat Mazdoor Samit v State of West Bengal* (1996) 4 SCC 37 (Supreme Court of India); *Consumer Education and Research Centre v Union of India* (1995) 3 SCC 42 (Supreme Court of India); *State of Kerala v N M Thomas* (1976) 2 SCC 310 (Supreme Court of India).

<sup>13</sup> AIR 1997 SC 3011 (Supreme Court of India).

<sup>14</sup> 1249 UNTS 13 (1980) (opened for signature 18 December 1979; entered into force 3 December 1981).

In the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its [sic] spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee. This is implicit from Article 51(c) and enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253...<sup>15</sup>

This approach – of directly implementing international obligations via constitutional interpretation of fundamental rights – in the absence of domestic law on the subject or any other conflicting law – has been widely accepted by Indian courts since *Vishaka*.<sup>16</sup> Whilst this is a strong statement of the potential for the direct use of international law (in sharp contrast with India's dualist roots) international law has been relied upon in a host of circumstances other than direct enforcement: in interpreting statutory or constitutional provisions;<sup>17</sup> for clarifying ambiguities in law;<sup>18</sup> for its persuasive value;<sup>19</sup> to enforce customary international law which does not conflict with any municipal law—for example, principles like 'sustainable development', 'precautionary principle', 'polluter pays principle', and 'public trust doctrine' have been enforced by courts as part of municipal law.<sup>20</sup> The Supreme Court in *Entertainment Network (I) Ltd v Super Cassette Industries*<sup>21</sup> summarized how international law may be used by courts – identifying six categories in particular:

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<sup>15</sup> *Vishaka* (n 13) [7].

<sup>16</sup> *Liverpool & London SP & I Assn Ltd v MV Sea Success I* (2004) 9 SCC 512, 540 (Supreme Court of India); *Pratap Singh v State of Jharkhand* (2005) 3 SCC 551, 578-579 (Supreme Court of India).

<sup>17</sup> *Gramophone Co of India Ltd v Birendra Bahadur Pandey* (1984) 2 SCC 534 (Supreme Court of India); *State of West Bengal v Kesoram Industries Ltd* (2004) 10 SCC 201 (Supreme Court of India).

<sup>18</sup> This principle was first recognized in the dissenting opinion of Khanna J in *ADM, Jabalpur v Shivakant Shukla* AIR 1976 SC 1207, 1259-1260 (Supreme Court of India), and has been followed in *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715 (Supreme Court of India).

<sup>19</sup> *Selvi v State of Karnataka* (2010) 7 SCC 263 (Supreme Court of India).

<sup>20</sup> *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715 (Supreme Court of India); *MC Mehta v Kamal Nath* 1996 (9) SCALE 141, 161 (Supreme Court of India).

<sup>21</sup> 2008 (9) SCALE 69 (Supreme Court of India).

(i) as a means of interpretation; (ii) justification or fortification of a stance taken; (iii) to fulfill spirit of international obligations which India has entered into, when they are not in conflict with the existing domestic law; (iv) to reflect international changes and reflect the wider civilization; (v) to provide a remedy contained in a covenant, but not in a national law; and (vi) to fill gaps in municipal law.<sup>22</sup>

As Section 3 below shows, all of these approaches are visible in the use of the CRPD by Indian courts. The chief takeaway from this brief recapitulation of India's international law position is that: although the thumb rule of dualism under Article 253 continues to operate, courts in India have changed the way international law is received and enforced in India; by exploring a spectrum of possibilities for engaging with it and thus, going beyond the two traditional models of either making international law self-executing (monism) or only applicable by transformation (dualism).

### **3. India and the CRPD**

India signed the CRPD on 30 March 2007 when it was opened for signature, along with 82 other States. It ratified the CRPD on 1 October 2007. The Convention came into force on 3 May 2008. With this arose the obligation to implement the rights and guarantees enshrined in the CRPD and to bring existing laws in conformity with the principles of the Convention.<sup>23</sup> Almost a decade later, the obligation was discharged on 16 December 2016 when the Indian Parliament finally passed the Rights of Persons with Disabilities Act 2016 ('RPD Act') replacing the existing Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 ('PWD Act'). This process of harmonizing the existing law with the CRPD has been a lengthy one.<sup>24</sup> It was only in May 2010 that the Ministry of Social Justice and Empowerment appointed an Expert Committee to draft a comprehensive new law. The Expert Committee in turn appointed a Legal Consultant, Prof Amita Dhanda, Head of the Centre for Disability Studies, NALSAR University of Law, Hyderabad, to lead the process of legal

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<sup>22</sup> Ibid 92.

<sup>23</sup> Articles 26 and 27, Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969; entered into force 27 January 1980); Articles 51(c) and 253 of the Constitution of India 1950.

<sup>24</sup> Amita Dhanda and Rajive Raturi (eds), 'Harmonizing Laws with the UNCRPD' (May 2010) <[https://d3gqux9sl0z33u.cloudfront.net/AA/AG/chrusp-biz/downloads/113311/Harmonizing\\_Laws.pdf](https://d3gqux9sl0z33u.cloudfront.net/AA/AG/chrusp-biz/downloads/113311/Harmonizing_Laws.pdf)> accessed 10 January 2016.

drafting and reform. The Rights of Persons with Disabilities Bill 2011 was drafted after extensive deliberations and nation-wide consultations, and was submitted by the Ministry to the Parliament for consideration in 2012.<sup>25</sup> But the 2012 version was substantially different and diluted as compared to the 2011 draft law.<sup>26</sup> In fact, since then the bill went through several rounds of revisions in 2013 and 2014, all reflecting a position inferior than that adopted in the draft before.<sup>27</sup> The most last version, the 2014 Bill, was introduced in the Rajya Sabha (the Upper House of the Parliament) on 7 February 2014 and considered by the Standing Committee on Social Justice and Empowerment since 16 September 2014.<sup>28</sup> The 2014 Bill was widely criticized for its ‘complete lack of understanding of the approach of the [CRPD]’<sup>29</sup> and failure to adopt the CRPD’s social model of disability within a human rights rather than welfare framework. In contrast the social model was duly embraced in the 2011 draft Bill.<sup>30</sup> But it was the 2014 Bill which – after several more rounds of amendments – was finally passed in the form of RPD Act 2016. The new legislation is a marked improvement over the PWD Act 1995 with its adoption of several of the rights and obligations under the CRPD especially in relation to equality and non-discrimination, legal capacity, reasonable accommodation, accessibility and universal design. It is, however, far from a comprehensive effort embracing the CRPD. For

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<sup>25</sup> For a complete history of drafting and justification of the 2011 draft bill, see Centre for Disability Studies, ‘Law and Policy Reform: The Rights of Persons with Disabilities Bill 2011’ <<http://www.disabilitystudiesnalsar.org/index.php>> accessed 10 January 2016.

<sup>26</sup> For comparisons between the two drafts see <<https://docs.google.com/file/d/0B64fpIIJNZL8TFNzRHJmOW85cjc/edit?pli=1>> accessed 10 January 2016.

<sup>27</sup> Amita Dhanda, ‘A Retrograde and Incoherent Law’ (6 February 2014) <<http://www.thehindu.com/todays-paper/tp-opinion/a-retrograde-and-incoherent-law/article5658595.ece>> accessed 10 January 2016; ‘Disability Bill flawed: NALSAR’ Express News: Hyderabad (6 February 2014) <<http://www.newindianexpress.com/cities/hyderabad/Disability-Bill-flawed-NALSAR/2014/02/06/article2040975.ece>> accessed 10 January 2016.

<sup>28</sup> For differences between the PWD Act, 2011 draft bill and the 2014 bill, see PRS Legislative Research, Legislative Brief on the Rights of Persons with Disabilities Bill, 2014 (20 February 2015) at p 6 <<http://www.prsindia.org/uploads/media/Person%20with%20Disabilities/Legislative%20Brief%20-%20Disabilities%202014.pdf>> accessed 10 January 2016.

<sup>29</sup> Amba Salelkar, ‘On The Draft Rights of Persons with Disabilities Bill, 2014, as cleared by Cabinet’ Inclusive Planet Centre for Disability Law and Policy (26 January 2014) <<http://inclusiveplanet.org/sites/default/files/Inclusive%20Planet%20Analysis%20of%20the%20Rights%20of%20Persons%20with%20Disabilities%20Bill%202014%2026.01.2014.pdf>> accessed 10 January 2016.

<sup>30</sup> Ashish Bharadwaj and Saptarshi Mandal, ‘The Rights of Persons with Disabilities Bill, 2014’ (2015) 1 Law and Policy Brief 1 <<http://www.jgls.edu.in/PDF/Volume-1-Issue-1-January-2015.pdf>> accessed 10 January 2016.

example, the RPD Act still relies on a specific list of recognized disabilities enumerated in the Schedule of the Act. Although it has enlarged the gamut of disabilities recognized from 7 to 21, including disability due to acid attacks, thalassemia, haemophilia, dwarfism, learning disabilities and Parkinson's disease; the list operates in an exhaustive way until amended by the government. Private sectors duties remain scarce and employment quota (reservation) for disabled persons has been raised only marginally from 3% to 4%. The real potential of the RPD Act will thus be revealed in its eventual interpretation and implementation in the coming years.

But as this chapter shows, appellate courts in India may already have laid down the groundwork for this. In the decade between the ratification and implementation of the CRPD via a new comprehensive legislation (2007-2016), courts continued to engage the CRPD in disability-related matters in light of existing laws, including the now-repealed PWD Act, the Mental Health Act 1987, the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999 and the Rehabilitation Council of India Act 1992. The next two sections of this chapter traverse the judicial landscape which has grappled with the CRPD obligations and draws out the tentative implications which can be deduced from this engagement.

#### **4. Indian Judicial Discourse on the CRPD**

The survey of Indian courts' engagement with the CRPD yields peculiar results. In terms of the breadth or volume of cases, the results are moderate; but in terms of the approaches preferred by the justices in these cases, the diversity is striking. This section seeks to map out the multifarious approaches adopted by Indian courts in using the CRPD. It is divided into two parts—Section 4.1 explains the basis of selection and organization of cases discussed in this chapter; and Section 4.2 thematically analyzes the case law in depth to help understand and distinguish the ways in which the CRPD is invoked.

##### ***4.1. Selection and organisation of cases***



The search for cases for the purposes of this chapter was performed on the leading online legal database Manupatra. The search terms included the ‘Convention on Rights of Persons with Disabilities’ and ‘CRPD’. The search was confined to appellate level courts only—i.e. the Supreme Court of India and the 24 State High Courts. Thus, lower (district) court cases and special tribunals were excluded from consideration. There are two reasons for this. First, at a practical level, the text of lower court judgments are not made available on online legal databases like Manupatra.<sup>31</sup> Secondly, even if they were to be sought out and examined, they may not provide the relevant fodder for the present inquiry. As Hedge rightly points out, lower courts—either ordinary or specialized, seldom refer to substantive norms of international law:

International law, it should be noted, remains an exotic, yet persuasive, legal tool for Indian courts, and is usually invoked at the level of high courts and the Supreme Court, although the lower judiciary gets to invoke some elements of international law and foreign law at the procedural level.<sup>32</sup>

Thus, though lower courts with ordinary jurisdiction may be dealing with disability issues such as under the PWD Act, they may not be dealing with them squarely within the framework of international obligations. Since international norms have been enforced primarily through constitutional rights (*per Vishaka*), it is strategic to focus on the enforcement of the CRPD by focussing on constitutional adjudication.<sup>33</sup> Articles 226 and 32 of the Constitution empower the High Courts and the Supreme Court respectively to hear cases involving breach of ‘fundamental rights’ enshrined in Part III of the Constitution. Further, given the record of ‘judicial activism’ in cases of public interest litigation under Articles 32 and 226, rights jurisprudence

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<sup>31</sup> The exception would be the Delhi district courts judgments which are available on the website Indiakanon.

<sup>32</sup> VG Hegde, ‘Indian Courts and International Law’ (2010) 23 *Leiden Journal of International Law* 53, 56.

<sup>33</sup> See for a similar logic followed in some of the leading writings on emerging disability jurisprudence in India: Kalpana Kannabiran, ‘Discrimination and the Standard Measures of Diversity’ in *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012) part II; Renu Addlakha and Saptarshi Mandal, ‘Disability Law in India: Paradigm Shift or Evolving Discourse?’ (2009) 44 *Economic and Political Weekly* 62.

has been particularly thriving at this level.<sup>34</sup> The choice of narrowing down to High Courts and the Supreme Court thus streamlines the raw material for the purposes of this chapter in a suitable way.

The search returned twenty-eight cases in total—out of which three were Supreme Court cases and twenty-six of them High Court cases from Telangana and Andhra Pradesh (1), Bombay (3), Delhi (9), Gujarat (3), Kerala (1), Madras (4), Orissa (2), Punjab and Haryana (1), and Rajasthan (1).<sup>35</sup> These cases demonstrate varied ways in which the litigating parties or the court have referred to the CRPD. The case analysis can be divided into two broad themes of ‘citation’ and ‘interpretation’. Within the first approach, the CRPD is merely cited by the parties before the court, by the judges themselves or by both. In this set of cases, the reference to the CRPD is a limited one, made in one of five ways—(i) the CRPD is cited as the legal basis of the claim; (ii) another court’s reference to the CRPD is mentioned; (iii) only the fact that India is a State Party to the CRPD is mentioned; (iv) the CRPD is cited with no particular point of reference; (v) the CRPD is wrongly cited as being given effect to in the pre-CRPD legislation, the PWD Act. The fact of mere citation in these five ways means that the parties or the courts did not in fact use the CRPD text in a substantial way. By contrast, the second approach of ‘interpretation’<sup>36</sup> involves the courts’ use of the CRPD which goes beyond mere citation to interpreting it in either of the two ways—(i) by substantially and directly relying on the CRPD as forming the legal basis of the claim, especially where there is a gap in the law; (ii) using the CRPD to bolster the court’s reasoning or confirm the stance taken by the court. These approaches are teased out discursively in the discussion below.

It is useful to note that the case analysis is based only on the text of the judgments and no case briefs or rejoinders filed by the parties have been perused. Even though these materials are relevant in understanding the

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<sup>34</sup> See SP Sathe, ‘Judicial Activism: The Indian Experience’ (2001) 29 Washington University Journal of Law and Policy 29.

<sup>35</sup> The number reflects the cases found within the search parameters described above and not necessarily the true number of cases because they were either not available online or were not returned in the search.

<sup>36</sup> See the idea of interpretation of international law by domestic courts André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011),

background and context of a claim, the inability to access them because they are not made readily available precludes their consideration.

Three further points must be borne in mind in the following discussion. First, not all rights cases decided by the higher judiciary come with a coherent and comprehensive justification for the courts' final orders.<sup>37</sup> This 'spirit of adventure'<sup>38</sup> embraced by the courts in adjudicating human rights cases in an enabling but not necessarily explicable way, characterizes disability jurisprudence as well.<sup>39</sup> The judgments considered in this chapter are similarly patchy in offering lucid reasons for invoking international law. Where possible, this gap is filled by reasonable deduction but it is useful to bear in mind both the relative brevity of the judgments and often their lack of an explanation of 'how' and 'why' the CRPD is used. Secondly, where the case analysis does not mention any specific provision of the CRPD, it means that the court did not in fact quote any provision specifically and quoted the CRPD only in general terms. Thirdly, as may be clear from the thematic layout above, the discussion of cases does not follow a chronological order but a format which helps explain the individual approaches of the courts. Table 1 below, chronologically lists the details of the cases considered in this chapter.

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<sup>37</sup> See generally Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India', in Jagga Kapur (ed), *Supreme Court on Public Interest Litigation* (vol I, LIPS Publications 1998).

<sup>38</sup> Philip Alston, 'Foreword' in Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009) ix.

<sup>39</sup> See Rumi Ahmed, *Rights of Persons with Disability in India* (CreateSpace Independent Publishing Platform 2015); Jayna Kothari, *The Future of Disability Law in India* (Oxford University Press 2012).

TABLE 1: CASE LIST

	Case	Court	Date Decided	Use (Cited/Interpreted)	CRPD Articles
1.	<i>Ranjit Kumar Rajak v State Bank of India</i>	High Court of Bombay	08.05.2009	Interpreted	2 and 27
2.	<i>Suchita Srivastava v Chandigarh Administration</i>	Supreme Court of India	28.08.2009	Cited	-
3.	<i>R Parthiban v State of Tamilnadu</i>	High Court of Madras	30.10.2009	Applied	12
4.	<i>Municipal Corporation of Greater Mumbai v Shrirang Anandrao Jadhav</i>	High Court of Mumbai	11.11.2009	Interpreted	Preamble, 1, 4, 27
5.	<i>Lalit v Government of NCT</i>	High Court of Delhi	07.05.2010	Interpreted	7, 9, 24
6.	<i>National Association of The Deaf through its Joint Secretary v Union of India</i>	High Court of Delhi	14.02.2011	Cited	-
7.	<i>Laxmikant Vijayvargia v Bharat Heavy Electricals Limited</i>	High Court of Delhi	04.04.2011	Cited	-
8.	<i>E Murugan v The General Manager (Operation) Metropolitan Transport Corporation Ltd</i>	High Court of Madras	26.0 4.2011	Cited	-
9.	<i>Management of DAV Public School v State of Orissa</i>	High Court of Orissa	27.06.2011	Cited	-
10.	<i>Rajpal v Delhi Transport Corporation</i>	High Court of Delhi	04.08.2011	Wrongly Cited	-
11.	<i>National Association of the Deaf v Union of India</i>	High Court of Delhi	24.11.2011	Interpreted	-
12.	<i>Social Jurist, A Civil Rights Group v Government of NCT of Delhi</i>	High Court of Delhi	05.09.2012	Cited	-
13.	<i>DS Chauhan v Railway Board, Ministry of Railways</i>	High Court of Delhi	15.10.2012	Cited	20
14.	<i>Akbari Kaushik Hansrajibhai v State of Gujarat</i>	High Court of Gujarat	01.11.2012	Cited	27
15.	<i>Sambhavana v University of Delhi</i>	Supreme Court of India	29.05.2013	Interpreted	24
16.	<i>Saravanan v Secretary to Government</i>	High Court of Madras	25.06.2013	Cited	3 and 29
17.	<i>Vibhu Dayal Sharma v Director</i>	High Court of Punjab and Haryana	02.07.2013	Interpreted	-
18.	<i>Dr Syed Abdul Wahab Abdul Aziz v State of Maharashtra</i>	High Court of Bombay	03.09.2013	Cited	24
19.	<i>Yusufbhai Hatimbhai Kachwala v Municipal</i>	High Court of Gujarat	24.01.2014	Wrongly Cited	-

	<i>Commissioner</i>				
20.	<i>Pramod Arora v Hon'ble Lt Governor of Delhi</i>	High Court of Delhi	03.04.2014	Cited	-
21.	<i>V Palani v Management of Metropolitan Transport Corporation (Chennai) Ltd</i>	High Court of Madras	04.06.2014	Interpreted	2(i)-(k), 2(m), 2(o)-(p), 2(t), 2(w), 4(d), 15(2), 17
22.	<i>Tushar Kesharao Deshmukh v Union of India</i>	High Court of Delhi	13.10.2014	Wrongly Cited	2
23.	<i>Susanta Kumar Sahoo v Union of India</i>	High Court of Orissa	04.12.2014	Cited	-
24.	<i>P Geetha v Kerala Livestock Development Board Ltd</i>	High Court of Kerala	06.01.2015	Cited	-
25.	<i>Desh Deepak Dhamija v Union Bank of India</i>	High Court of Rajasthan	14.01.2015	Interpreted	2 and 27
26.	<i>Rajesh Motibhai Desai v State of Gujarat</i>	High Court of Gujarat	09.07.2015	Cited	12
27.	<i>M Venkateswarlu v Andhra Pradesh State Road Transport Corporation</i>	High Court of Telangana and Andhra Pradesh	29.01.2016	Interpreted	Preamble, 2, 4, 27
28.	<i>Jeeja Ghosh v Union of India</i>	Supreme Court of India	12.05.16	Interpreted	5 and 9

## 4.2. Emerging themes

### 4.2.1. Citation

The number of cases which seem to have ‘simply cited’ the CRPD is seventeen, which is a considerable proportion of the twenty-eight cases returned in the search. Citations have appeared either on behalf of the parties, the courts themselves or from both. Five approaches emerge from these citations.

First, in three of the cases, the courts mentioned that the CRPD had been given effect through the PWD Act—which is wholly incorrect since the PWD Act is a piece of pre-CRPD legislation which was enacted in 1995, seventeen years before the CRPD came into force.<sup>40</sup> In fact, the PWD Act was adopted to give effect to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific region, to which India is a signatory. Further analysis of these incorrect citations in the three cases yields no significant results.

Secondly, the CRPD has been cited by the parties, the court or both as forming the basis of the claim. This seems to be the position in the remaining fourteen decisions. In four out of the fourteen, only the Petitioner relied upon the CRPD as the legal basis of the claim. This was not picked up by the justices later or considered in the court’s reasoning. For example in *Saravanan v Secretary to Government*,<sup>41</sup> the Madras High Court considered a challenge to Section 34(i) of the Tamil Nadu Co-operative Societies Act 1983 which was contended as prohibiting blind candidates from running for positions on the Board of Directors of co-operative societies. According to the said rule, anyone who could not read and write Tamil or English or such other working language stipulated by the government was disqualified from contesting the elections. The Petitioners argued that the prohibition was ‘directly in contravention of the [CRPD]’ on the basis that:

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<sup>40</sup> *Rajpal v Delhi Transport Corporation* (2012) ILLJ 529 Del (High Court of Delhi); *Yusufbhai Hatimbhai Kachwala v Municipal Commissioner* 2014 GLH(3) 472 (High Court of Gujarat); *Tushar Kesharao Deshmukh v Union of India* 2014 (146) DRJ 23 (High Court of Delhi).

<sup>41</sup> (2013) 6 MLJ 708 (High Court of Madras).

Article 3...ensure[s] non-discrimination, full and effective participation and inclusion in society, equal opportunity and for acceptance of persons with disabilities as part of human diversity and humanity...[and] Article 29 of the Convention, [obliges] the States...to [guarantee] persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, which includes the right of the persons with disabilities to stand for election.<sup>42</sup>

The Court found the case to be unmeritorious since the Petitioners were disqualified from the elections not on the basis of visual impairment but because they were illiterate.<sup>43</sup> In relation to the validity of the legislative disqualification, it held that the plain language of the provision did not in fact bar blind candidates but only those who were illiterate.<sup>44</sup> Given this, it did not go on to examine the case in light of the provisions of the CRPD because the literal interpretation of the disqualification did not squarely touch upon disability. Similarly, in *Pramod Arora v Hon'ble Lt Governor of Delhi*,<sup>45</sup> the Petitioners relied upon the CRPD as forming the legal basis of their claim along with the PWD Act. The claim involved a challenge to the amendment to Section 2(d) of the Right to Education Act 2009 (RTE Act) on the basis that it put disabled children at a disadvantage by defining 'child belonging to disadvantaged group' as including disabled children. This meant that disabled children had to compete within the 25% quota earmarked for the general category of 'child belonging to disadvantaged group' under Section 12(l) of the RTE Act; instead of a separate 3% quota guaranteed under Section 26 of the PWD Act which mandated the government to provide access to free education in an appropriate environment to permit the integration of disabled children. In being clumped together with other disadvantaged students, the Petitioners claimed that the needs of their disabled children were neglected as regards accessibility, integration and providing an enabling environment. The Petitioners thus argued that:

all schools must therefore provide for [disabled children], as the right to inclusive education is a right guaranteed to them under the PWD Act and according to the [CRPD]...all schools must keep 3% seats for [disabled children] and also at the same time upgrade their infrastructure and

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<sup>42</sup> Ibid [6].

<sup>43</sup> Ibid [13].

<sup>44</sup> Ibid [35].

<sup>45</sup> (2014) X AD (Delhi) 241 (High Court of Delhi).

preparedness to handle such children [because] [t]he [CRPD] guarantees to them non-discrimination on the basis of their disability.<sup>46</sup>

After a complex constitutional analysis, the Court found that the 25% quota must provide for a sub-classification for disabled children to ensure that their right to 3% reservation is not diluted.<sup>47</sup> In light of the abysmal conditions of admitting and integrating disabled children in primary schools,<sup>48</sup> the Court further went on to propose an elaborate admission and reporting mechanism for disabled children in primary and 1st grade, i.e. entry level classes. The wide scope of this order is not unusual. Social rights adjudication, including and especially in right to education cases, often involves complex remedial orders in the form of structural interdicts and other such ‘open’ remedies.<sup>49</sup> But despite this very broad order, the Court’s reasoning did not pan beyond constitutional and legislative commitments and no use of the CRPD was made in the judicial analysis.

Likewise, in *Social Jurist, A Civil Rights Group v Government of NCT of Delhi*,<sup>50</sup> the Petitioners requested the appointment of Special Educators and barrier free access in recognized unaided and aided private schools in Delhi. They grounded the claim in a slew of legal provisions including the CRPD:

the failure on the part of these schools to have adequate physical and academic infrastructure in place for the education of the children with disabilities has resulted in violation of [RTE Act] of such children as guaranteed under Articles 14, 15, 21, 21-A & 38 of the Constitution of India read with the provisions of Delhi School Education Act, 1973, [PWD Act] [and] the UN Convention on the Rights of the Child (1989) and [the CRPD].<sup>51</sup>

The High Court of Delhi held that the appointment of two Special Educators was mandatory and not dependent on the admission of disabled children in need of them and the right to education of disabled children included all kind of facilities to provide for their inclusion and integration

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<sup>46</sup> Ibid [8].

<sup>47</sup> Ibid [50].

<sup>48</sup> Ibid [53].

<sup>49</sup> See Aruna Sathanapally, *Beyond Disagreement: Open Remedies for Human Rights Adjudication* (Oxford University Press 2012).

<sup>50</sup> (2012) ILR 6 Delhi 308 (High Court of Delhi).

<sup>51</sup> Ibid [1].



in schools. Despite the favourable outcome, the Court did not rely on the CRPD in reaching its conclusion. As Section 4.2.2. shows, *Pramod Arora* and *Social Jurist* lie in sharp contrast with other right to education cases which have used the CRPD much more substantively.<sup>52</sup> Much the same can be said of the approach of the Gujarat High Court in *Akbari Kaushik Hansrajhai v State of Gujarat*<sup>53</sup> where the Petitioner invoked Article 27 of the CRPD to claim his right to work having been denied appointment as a blind language teacher.<sup>54</sup> The claim under Article 27 was left unaccounted for in the Court's analysis where the Petitioner ultimately obtained relief under the PWD Act.

The court may itself cite the CRPD without being prompted by the parties before the court. In *Susanta Kumar Sahoo v Union of India*,<sup>55</sup> the High Court of Orissa merely cited the CRPD in connection with the general proposition that there is a right to education for disabled children under the Convention. This was repeated in *Management of DAV Public School v State of Orissa*<sup>56</sup> in relation to disabled children's right to education. However, the courts have made no further reference or use of the CRPD generally or Article 24 specifically. In *Rajesh Motibhai Desai v State of Gujarat*,<sup>57</sup> the reference to the CRPD was a bit more substantial in that the High Court of Gujarat noted the shift from a welfare to human rights model of disability brought about by the CRPD.<sup>58</sup>

There are two cases where the CRPD has been relied upon both by the Petitioner and the court as forming the legal basis of the claim. *DS Chauhan v Railway Board, Ministry of Railways*<sup>59</sup> involved a challenge to the policy of Indian railways which provided concessions to deaf people who cannot speak but did not to deaf people who can speak. The Court framed this issue as a question of a violation of the CRPD in the introductory paragraph of the case as: 'whether the railway has an

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<sup>52</sup> See infra Section 4.2.2 and Section 5.1.

<sup>53</sup> (2013) ILLJ 637 Guj (High Court of Gujarat).

<sup>54</sup> Ibid [10].

<sup>55</sup> Writ Petition (Civil) No. 12807 of 2013 (decided on 4 December 2014) (High Court of Orissa).

<sup>56</sup> 2011(2) ILR-CUT 301 [28] (High Court of Orissa).

<sup>57</sup> 2016 LabIC 698 (High Court of Gujarat).

<sup>58</sup> Ibid [49] ('The Convention marks a shift in viewing disability from a social welfare concern to a human rights issue, which involves acknowledging that societal barriers and prejudices are themselves disabling.').

<sup>59</sup> 2012(132) DRJ 905 (High Court of Delhi).

obligation to all mobility challenged disabled persons under Article 20 of the [CRPD] to extend the concession'.<sup>60</sup> Despite such a framing of the case, the Court went on to evaluate the claim from the standpoint of the PWD Act and not under Article 20 of the CRPD. It found that although Article 20 obliged the States to take effective measures to ensure personal mobility of disabled persons to the greatest extent possible, this standard was already fulfilled by the Railways when considered in light of the existing obligations under the PWD Act, and thus Article 20 did not create a separate right or standard for the Petitioner to claim under. Whilst both sides refer to the CRPD, the text of the judgment shows only peripheral engagement with it by both the Petitioner and the Court. A second example of this is the case of *National Association of the Deaf through its Joint Secretary v Union of India*.<sup>61</sup> The National Association of the Deaf challenged the complete ban on deaf persons from obtaining driving licenses. They used 'the [CRPD] which was ratified by India in October, 2007 to pyramid the contention that a person who has an international driving licence can drive in India and a deaf person in India if goes abroad can get an international driving licence and would be eligible to drive in India whereas he is not entitled to get a driving licence [in India]'.<sup>62</sup> The Petitioner argued on the basis of this tension between municipal and international law that India's international commitments could not 'be given an indecent burial in the name of policy making'.<sup>63</sup> The Court noted that the special expert committee constituted by the Ministry of Road Transport and Highways had used the CRPD to justify the ban. Since the Convention did not specify the level of deafness, there was nothing inconsistent with the CRPD in disallowing deaf persons to drive without regard to the level of their deafness.<sup>64</sup> Rejecting this argument, the Court held that whilst special exceptions for licenses could not be granted, even totally deaf persons were eligible to be granted a license if they passed the test. Despite the sporadic references to the CRPD by the Petitioner and the Court, there is no indication of whether the CRPD actually played a concrete role in the reasoning.

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<sup>60</sup> Ibid [1].

<sup>61</sup> 2011(2) TAC 824 (High Court of Delhi).

<sup>62</sup> Ibid [4].

<sup>63</sup> Ibid [8].

<sup>64</sup> Ibid [22].

Thirdly, and to an even lesser extent, one court cited the CRPD with reference to no point in particular. In *Laxmikant Vijayvargia v Bharat Heavy Electricals Limited*,<sup>65</sup> the High Court of Delhi cited the Petitioner as having relied upon the PWD Act and the CRPD as the basis of his compensation claim because it was a claim relating to a disabled person.<sup>66</sup> The citation of the CRPD was made without any specific purpose but merely because it was a disability case.

Fourthly, in some cases another court's reference to the CRPD is mentioned. Two cases seem to have done this. In *Dr Syed Abdul Wahab Abdul Aziz v State of Maharashtra*,<sup>67</sup> the High Court of Bombay made a reference to a judgment of the Division Bench of the High Court of Bombay, which used the CRPD to secure a visually-impaired claimant's right to education under Article 24.<sup>68</sup> The Court cross-referenced the case of *Kritika Purohit v State of Maharashtra*<sup>69</sup> where the Petitioner successfully challenged the denial of admission to a degree course in physiotherapy under Article 24 of the CRPD. The Court in *Kritika Purohit* granted relief both on the basis of PWD Act and Article 24 of the CRPD and instructed the government to admit the claimant to the physiotherapy degree. The Court in *Syed Abdul* then relied upon the decision in *Kritika Purohit* to enforce the rights of the Petitioner who was denied admission to a graduate course because of his locomotory disability of lower limb and 45% visual impairment. In another case of *P Geetha v Kerala Livestock Development Board Ltd*,<sup>70</sup> the High Court of Kerala makes a reference to the decision of the Court of Justice of the European Union in *Z v A Government Department*<sup>71</sup> which dealt with a broadly similar matter. The CJEU had denied the claim for paid maternity leave to a commissioning mother of a surrogate pregnancy who was unable to have a child by natural means as a result of an impairment. She claimed that this amounted to disability discrimination in comparison with mothers who were able to give birth or who adopted a child. In this process, the CJEU had considered the question '[whether the CRPD is]

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<sup>65</sup> Writ Petition (Civil) No 6529/2007 (decided on 4 April 2011) (High Court of Delhi).

<sup>66</sup> Ibid [16].

<sup>67</sup> 2013(6) ABR 153 (High Court of Bombay).

<sup>68</sup> Ibid [27].

<sup>69</sup> Writ Petition (Civil) No. 979 of 2010 (decided on 2 August 2010) (High Court of Bombay).

<sup>70</sup> 2015(1) KLJ 494 (High Court of Kerala).

<sup>71</sup> Case C-363/12 *Z v. A Government department, The Board of management of a community school*, ECLI:EU:C:2014:159. See Waddington in this volume for further commentary on this case.

capable of being relied on for the purposes of interpreting, and/or of challenging the validity’ of EU law.<sup>72</sup> It had found that the CRPD was ‘capable of being relied on for the purposes of interpreting [EU Law] which must, as far as possible, be interpreted in a manner that is consistent with [it]’,<sup>73</sup> but went on to find that the provisions in the CRPD were not ‘unconditional and sufficiently precise...that they therefore do not have direct effect in European Union law’.<sup>74</sup> The Kerala High Court understood this as a position which implied that it was only ‘the domestic [EU] law that [governed] the issue’.<sup>75</sup> Relying on this, it went on to hold that: ‘In the absence of any leave provided for bringing up a child, this Court cannot direct the first respondent Board to provide any leave to the petitioner for that purpose’.<sup>76</sup> Like the CJEU, it thus denied the commissioning mother the right to convalescing or recovery leave because she did not physically bear and deliver the child. There is apparent hypocrisy in the stance adopted by the High Court of Kerala. In one way, it simplifies and ultimately mischaracterizes the CJEU’s position that the CRPD had no direct effect because only ‘domestic law’, i.e. directives of the European Union were applicable to the case; but in another way, it itself relies on the CJEU’s decision even though it is a foreign court and not part of the Indian ‘domestic law’. This position of the High Court of Kerala may be exceptional given that the examples considered in Section 4.2.2. below, which show that the CRPD has also been applied directly and substantively by the Indian courts, even before it was explicitly given effect by the legislature through the RPD Act 2016.

Fifthly, in one case the CRPD was cited to draw force from the fact that India is a State party to it. The purpose of highlighting this fact is not clear given that the Court makes no further use of the citation; but it can be surmized that the CRPD provides a kind of persuasive value or moral force to the Court’s legal analysis under the PWD Act and the Constitution. In *E Murugan v The General Manager (Operation) Metropolitan Transport Corporation Ltd*,<sup>77</sup> the Madras High Court

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<sup>72</sup> Ibid [91].

<sup>73</sup> Ibid [75].

<sup>74</sup> Ibid [90].

<sup>75</sup> *P Geetha* (n 70) [70].

<sup>76</sup> Ibid [71].

<sup>77</sup> Writ Petition (Civil) No. 10694 of 2011 (decided 26 April 2011) (High Court of Madras).

granted the petition asking for alternative employment, back wages and attendant benefits for an employee who was dismissed because he acquired a disability during the course of his employment. In giving a broad and generous reading to Article 21 of the Constitution on right to life and the right to non-discrimination in government employment under Section 47 of the PWD Act, the Court seems to add the reference to the CRPD in order to bolster its final reasoning:

The rights of the disabled have been spelt out in the Disabilities Act which is only an expansion of the rights enshrined in Article 21 of the Constitution of India. Our Country has also signed the [CRPD]. Therefore, a person who had suffered disability is entitled to be employed without any loss financially...<sup>78</sup>

Mere force of ratification seems to provide the Court with a moral basis in the absence of a clear legal basis until the Government enacts legislation implementing the CRPD domestically. Despite this limitation, courts have not only cited the CRPD in the five ways discussed above, but have also given it direct legal force in either of the two ways of substantively using it in interpreting a claim or using it to bolster or confirm the correct legal position which is consistent with India's international commitments. This is evident in the cases considered in the next section.

#### 4.2.2. Interpretation

Substantive use of the CRPD and its provisions has also been made by the appellate courts to give a broad interpretation to rights of disabled persons, even before the CRPD was explicitly given force through the RPD Act 2016. The two trends of either using the CRPD directly in interpreting the rights or using it to bolster their interpretation can be explained with reference to eleven cases. One of the first cases which referred to the CRPD, did so substantively. The 2009 decision of the Bombay High Court in *Ranjit Kumar Rajak v State Bank of India*<sup>79</sup> sets a high benchmark for how the CRPD can be implemented directly, even in a dualist State like India which has not yet enacted a domestic legislation implementing an international agreement. Taking the cue from *Vishaka*

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<sup>78</sup> Ibid [8].

<sup>79</sup> 2009(5) BomCR 227 (High Court of Bombay).

and the absence of municipal law or discourse informing the issue of reasonable accommodation and the test for assessing ‘undue hardship’, the Court used the CRPD and its travaux préparatoires to fill the legal gap. The Court was concerned with the question whether ‘a person who is fully qualified for a post because of his past or present medical condition which otherwise does not interfere with his fitness to dispense the duties of his post [can] be denied employment because of the financial burden that would be cast on the employer?’.<sup>80</sup> The Petitioner in the case had had a kidney transplant which did not in any way interfere in discharging his employment obligations. He was dismissed merely on the basis of his kidney transplant and the monthly cost of medical care accrued by the employer. The Court first established the Petitioner’s right to work, employment and livelihood quoting in full Article 27 of the CRPD and the Constitutional guarantees of equality before law and equality of opportunity in Articles 14 and 16(1) respectively.<sup>81</sup> It went on to consider the meaning of the right in the context of disability by drawing on the obligation of ‘reasonable accommodation’ and the limits of claiming ‘undue hardship’. After perusing the CRPD’s definition of ‘reasonable accommodation’ in Article 2,<sup>82</sup> the Court referred to the preparatory materials to understand its meaning.<sup>83</sup> It found that the UN Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (‘Ad Hoc Committee’) – responsible for the drafting of the Convention – had drawn inspiration from at least two popular models in municipal laws of the US and Canada.<sup>84</sup> According to the US Rehabilitation Act 1978 the concept of ‘disproportionate burden’ was used to cast limits on the employer’s liability in ensuring reasonable accommodation and it involved: ‘(1) an insistence on “reasonableness in the circumstances”; and (2) an underlying proportionality test that balances the rights of and burdens and benefits to, all persons affected by the proposed accommodation or adjustment’.<sup>85</sup> In the Canadian context, the concept of ‘undue hardship’ was assessed in accordance with factors like—‘Financial cost disruption of a collective agreement; the morale of

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<sup>80</sup> Ibid [1].

<sup>81</sup> Ibid [8] [14].

<sup>82</sup> Ibid [14].

<sup>83</sup> Ibid [15].

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

other employees; interchangeability of the workforce and facilities; the size of the employer's operation (because this may relate to the employer's ability to bear the cost and adapt the workplace); safety'.<sup>86</sup> The Court then noted that since the PWD Act did not cover employment of disabled persons or refer to the concept of reasonable accommodation, it was appropriate to refer to the CRPD's understanding to fill in the gap in municipal law on the subject.<sup>87</sup> Thus, taking a cue from Articles 14 and 15 on equality and non-discrimination, the ruling on direct enforcement of international law in *Vishaka* and the fact that India was a State Party to the CRPD, the Court found that the Convention could be made enforceable because:

The law is now well settled that though United Nation Convention may not have been enacted into the Municipal Law, as long as the convention is not in conflict with the Municipal Law and can be read into Article 21 it is enforceable. Therefore, in the absence of any conflict it is possible to read the test of reasonable accommodation in employment contracts.<sup>88</sup>

According to the Court, reading international law to fill in the gap in municipal law 'give[s] added life and dimension to the ever expanding concept of life and its true enjoyment'<sup>89</sup> and that '[t]he theory of reasonable accommodation even in the absence of municipal law must, therefore, flow from our constitutional principle of the right to life and to live it with dignity'.<sup>90</sup> In its classic approach of reading Article 21 on the right to life in an expansive way, the Court found that the right to adequate means of livelihood within the State's economic capacity<sup>91</sup> meant that:

A duty is, therefore, cast on the State to provide reasonable accommodation in the matter of employment subject to the burden of hardship test being satisfied. In the absence of a statutory definition of reasonable accommodation, the reasonable accommodation as set out in the [CRPD] in the first instance can be considered. It will have to have a nexus with the financial burden on the institution and/or undertaking which will have to bear

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<sup>86</sup> Ibid.

<sup>87</sup> Ibid [16]. The RPD Act 2016 now recognises the concept of reasonable accommodation in Sections 2(h) and 2(y), 3(5) and specifically in relation to employment under Section 20(2).

<sup>88</sup> Ibid [17].

<sup>89</sup> Ibid [22].

<sup>90</sup> Ibid [27].

<sup>91</sup> Per *Olga Tellis* (n 12).

the burden and further the extent to which reasonable accommodation can be provided for.<sup>92</sup>

The Court found that the employer had not placed any evidence to prove that the monthly expenditure of Rs 13,000 could qualify as an ‘undue burden’ in the context of (by applying the understanding adopted by the CRPD) ‘the size of the organisation, the financial implications on the organisation and/or on the morale of other employees and the like’.<sup>93</sup> It thus ordered the Petitioner to be reinstated within sixty days of the decision.<sup>94</sup>

While there was a genuine gap in law on the subject of reasonable accommodation and undue hardship in *Ranjit Rajak*, the CRPD can be used directly and substantively where the law on the subject is vague or only tangentially relevant. Thus, even when the RPD Act 2016 has now recognised the concept of reasonable accommodation; judicial interpretation of the CRPD in areas which still remain unclear or outside of the purview of the new Act will remain instructive. In the latter case, the fact that the CRPD provides a clear conceptual force has made it the ultimate legal basis for a court to pronounce upon. For example, in *Lalit v Government of NCT*<sup>95</sup> the Petitioners challenged the order of eviction from the hostel attached to their state-run institution for the blind. The petitioners were all male, between the ages of 25-35 and were said to be causing considerable difficulty and disturbance to other blind pupils in the hostel especially young students in Classes I-VIII.<sup>96</sup> The Respondent explained the eviction on the basis of lack of capacity at the institution for housing residents other than pupils studying in school.<sup>97</sup> Since other older residents were also at the institution and not being evicted, the Petitioners claimed the right to be treated equally and in a non-discriminatory manner without distinction between deserving and undeserving blind residents.<sup>98</sup> The Court was thus tasked with balancing the competing interests of younger pupils and older residents at the institution. The

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<sup>92</sup> *Ranjit Rajak* (n 79) [21].

<sup>93</sup> *Ibid* [29].

<sup>94</sup> *Ibid* [30].

<sup>95</sup> Writ Petition (Civil) No. 8568 of 2009 (decided on 2 December 2010) (High Court of Delhi).

<sup>96</sup> *Ibid* [3]-[4].

<sup>97</sup> *Ibid* [12].

<sup>98</sup> *Ibid* [11].



Court found guidance in the clearest and most persuasive statement on the right to education under the CRPD:

the context of the inviolable human rights of the disabled, it is necessary to take note of the binding and mandatory provisions of [PWD Act] (specifically Sections 26 and 30) and the [CRPD] which has been ratified by India. In particular, Article 7 which set out the obligations of the States towards children with disabilities, Article 9 which obliges the States to take appropriate measures to ensure access to “schools, housing, medical facilities”, and Article 24 which deals with the right to education are relevant. In the context of the present case, reference may be made to Article 24(2) CRPD...<sup>99</sup>

The Court went on to quote from and draw upon Article 24 to prioritize the right to education of disabled children over the right of older residents to be housed at the institution. It is this legal basis which formed the core of the Court’s reasoning:

Viewed in the above background, primary purpose of having a hostel attached to the [institution] was to ensure that visually challenged young students, up to Class VIII, are provided shelter during their stint at the school. [Thus] [t]he policy of restricting the hostel facility to children who have not yet completed Class VIII is a reasonable one considering the limited scope of availability of the fundamental right to education to the age group of six to fourteen...If this primary object is not kept in view, then it may result in an unfair denial of the right to education of other deserving young students who are visually challenged.

The Court thus ordered the removal of the older residents on the basis of enforcing the right to education for disabled children (which was most clearly spelt out in the CRPD) and the conditions necessary for realizing that (drawn from Article 24(2)), i.e. residence at the institution of their learning. The RPD Act 2016 now recognises the duties of the State in relation to education of disabled persons under Sections 16-18; but the interpretation in *Lalit* which is specifically rights-based and CRPD-consistent, may continue to strengthen the way in which the State’s duty is actually enforced today. This trend is reinforced by the Supreme Court which drew upon Article 24 in a similar way in *Sambhavana v University of Delhi*.<sup>100</sup> The Petitioner in *Sambhavana* sought a direction that the Respondent (the University of Delhi) should introduce blind-friendly foundation courses in its curriculum, provide accessible reading materials

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<sup>99</sup> Ibid [14].

<sup>100</sup> AIR 2013 SC 3825 (Supreme Court of India).

and learning tools for effective education, and provide for representation of disabled persons in university administration. After reminding itself of the statutory basis of the right to education in Sections 30 and 32 of the PWD Act, the Court went on to develop fully and contextualize the right in light of Article 24(4) of the CRPD. It was seen as mandating the States Parties to realize the right to education by taking ‘appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education...incorporate[ing] disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities’.<sup>101</sup> The Court granted the claim relying on this extensive breadth and scope of Article 24 of the CRPD. Since the CRPD provided a deeper level of detail relevant to the matter, the Supreme Court was inclined to interpret the statutory rights in light of the strides made in the CRPD. It thus remarked that: ‘[w]e are absolutely conscious that there is an enactment [PWD Act] but India has shown its concern by ratifying the said Convention and, therefore, we have reproduced the same’.<sup>102</sup> What becomes clear in the Court’s final order which asks the Appellant-organization to attend immediately to the grievances of blind pupils is that, this ‘reproduction’ of the CRPD obligations underlined the Court’s interpretation of the existing constitutional and statutory obligations.<sup>103</sup>

In the same way, the High Court of Rajasthan in *Desh Deepak Dhamija v Union Bank of India*<sup>104</sup> specifically relied upon Article 27 on the right to work under the CPRD to find that the denial of a job to an otherwise qualified person on the basis of his medical condition was unlawful under Article 21 of the Constitution. The enforcement of the CRPD via Article 21 seems to have been done in a non-tedious and terse way, especially so, when there was no other law clarifying the position of those with chronic diseases. The Court’s consolidated reasoning for the order appears thus:

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<sup>101</sup> Ibid [11].

<sup>102</sup> Ibid [12].

<sup>103</sup> The Supreme Court also relied upon Article 41 of the Constitution of India which casts a duty on the State to make effective provisions for securing, inter alia, the rights of disabled persons and those suffering from other infirmities within the limits of economic capacity and development. Ibid.

<sup>104</sup> 2015(2) CDR 780 (Raj) (High Court of Rajasthan).

The physical disability as mentioned in the [PWD Act] although does not include the chronic disease, cannot be treated as prohibited or unlawful. It cannot be read to say that a person suffering from chronic disease like the renal failure cannot be granted job. In the absence of any law, the action of State must be guided by the Directive Principles which governs the legislative function of the State. It is incumbent upon the State to safeguard the constitutional mandate and must ensure fairness and equality along with right to work and livelihood granted under Article 21 of the Constitution subject to the test laid down in Article 21 of the Constitution.<sup>105</sup>

The High Court of Rajasthan in *Desk Deepak* does not offer as much justification as was offered by the High Court of Bombay in *Ranjit Rajak* for directly enforcing the CRPD via Article 21. The former found the gap in law to be automatically filled in favour of the Petitioner via the Constitution and binding international commitments. The trend can be traced back to *Municipal Corporation of Greater Mumbai v Shrirang Anandrao Jadhav*,<sup>106</sup> where the Court relied on the CRPD to interpret Section 47 of the PWD Act on non-discrimination in government employment. The case involved dismissal of a driver who had acquired a disability during the course of his employment. In reinstating the terms and benefits of the employment, the Court held that employers could not deny the protection of Section 47 when the disability of the employee was less than 40%. Justice Chandrachud kept the line of reasoning short but pointed. He relied on the mandate of Preamble, Articles 1, 4 and 27 of the CRPD and the fact that non-discrimination, especially in public employment did not seem to be limited on the basis of level of disability, especially when it was acquired during the course of the employment.<sup>107</sup> *Shrirang* was followed in *M Venkateswarlu v Andhra Pradesh State Road Transport Corporation*,<sup>108</sup> which involved similar facts. The High Court of Telangana and Andhra Pradesh once again quoted the Preamble and Articles 2, 4 and 27 and held that:

It is thus beyond pale of doubt that the provisions of Section 47 of the [PWD] Act are attracted if a serving employee acquires disability, irrespective of degree of disability and even if such disability is not covered by definition clauses in [the PWD Act]. The respondent corporations are bound by the said mandate and the United Nations Convention.<sup>109</sup>

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<sup>105</sup> Ibid 22.

<sup>106</sup> Write Petition (Civil) No. 1900 of 2009 (decided on 11 November 2009) (High Court of Mumbai).

<sup>107</sup> Ibid [8]-[9].

<sup>108</sup> 2016 LabIC 1671 (High Court at Hyderabad for Telangana and Andhra Pradesh).

<sup>109</sup> Ibid [42].

This seems to have been a popular trend—to enforce rights under the CRPD directly without lengthy justifications, arguably justified by the delayed implementation of the CRPD, completed only in December 2016 through the adoption of the RPD Act. For example in *Vibhu Dayal Sharma v Director*,<sup>110</sup> the High Court of Punjab and Haryana was called upon to extend the right to be employed under a disability reservation (a 3% employment quota) under the PWD Act to the Petitioner who had a chronic disease. The Court found it appropriate to dispose the matter by urging the Parliament to consider this issue instead. It did so, by agreeing with the Petitioner that such reconsideration had become necessary in light of developments in international law and law in other jurisdictions.<sup>111</sup> The Petitioner had argued that India has not kept pace with the development of disability law under the CRPD and other countries like the UK where the definition of what constitutes a disability had considerably expanded to include certain chronic illnesses. In a rare instance, the Court noted the developments in India in relation to bringing the municipal law in line with the CRPD:

In the light of presentation of a Bill by a Committee appointed by the Ministry of Social Justice and Empowerment, Government of India on 30.06.2011 on a research prepared by the Centre for Disability Studies, NALSAR University of Law, Hyderabad, India in its effort to enact a new law in harmony with the [CRPD]. The [CRPD] is for full realization of all human rights and fundamental freedoms for all Persons with Disabilities without discrimination of any kind on the basis of disability. India is under an international commitment and is obligated to enact suitable legislation in furtherance of the rights recognized in the UN Convention. The [PWD Act] has been on the Statute Book in India for 18 years but the Act does not incorporate the number of rights recognized in the [CRPD] or the recognized rights are not in total harmony with the principles of the Convention. It has been suggested that the Constitution of India needs to be amended in order to remove discrimination on grounds of disability so as to include the term disability in Articles 15 & 16 of the Constitution as one of the prohibited grounds.<sup>112</sup>

The Court acknowledged the (then) impending Draft Rights of Persons with Disabilities Bill 2012 and noted that it did not include chronic illnesses in the definition of disability. In the circumstances where a new piece of legislation on disability was in the pipeline but did not cover

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<sup>110</sup> 2013(4) SCT 647 (P&H) (High Court of Punjab and Haryana).

<sup>111</sup> Ibid [3].

<sup>112</sup> Ibid.

chronic illnesses, Raina J, found it most appropriate to propose the following order to the government:

I deem it fit in the future interest of stake holders that the respondents and particularly the Union of India to consider whether Cancer, illnesses and diseases which may medically qualify as disabilities in its generic sense which adversely effect such persons day-to-day basis, can fall as disability sufficient to merit reservation in educational seats etc. In view of the complexities involved, it would not be appropriate for this Court to fix any time line and would only hope that the matter is examined holistically for the attention it deserves before the new law is enacted replacing the [PWD Act] to keep pace with International Conventions, United Nations declarations and charters on the subject to consider if can be brought into domestic law and make it dynamic and ahead of times.<sup>113</sup>

Given that no new law was enacted in the two years following Raina J's decision, it is understandable why the High Court of Rajasthan did not defer to legislative will in *Desh Deepak*. The slow pace of development of disability law, especially in bringing it in line with the CRPD, seems to have provided an inarticulate but justifiable ground for courts (per *Vishaka*) to address the gap in law. Thus, *Ranjit Rajak*, *Shrirang*, *Lalit*, *Sambhavana* and *Desh Deepak* are, by no means, outliers in the way courts make use of the CRPD directly and substantively. But there may be circumstances where there is no real gap in the law on a subject. While not operating as the legal ground for relief in such a case, the CRPD can still add persuasive force to a transformative interpretation of disability rights under municipal law. In this way, reliance on the CRPD may provide a broad basis for the interpretation of the new RPD Act, even where its own terms may appear limited. This approach can be extrapolated from the way in which the Supreme Court invoked the CRPD in the seminal case of *Suchita Srivastava v Chandigarh Administration*.<sup>114</sup> The case involved an appeal to quash the decision of the Punjab and Haryana High Court ordering an abortion for a pregnant rape victim who had an intellectual disability ('mental retardation'). The Supreme Court quashed the termination of pregnancy on grounds that: (i) the High Court could not have ordered the abortion without the consent of the woman in question because the legal basis under the Medical Termination of Pregnancy Act 1971 limited the revocation of consent

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<sup>113</sup> Ibid [5].

<sup>114</sup> AIR 2010 SC 235 (Supreme Court of India).

only in relation to minors and persons with ‘mental illness’ (which is distinct from ‘mental retardation’ under the said statute); and (ii) failing that statutory basis, the High Court could still not have exercised ‘parens patriae’ jurisdiction in the ‘best interests’ of the woman who clearly wanted to bear the child.<sup>115</sup> The Supreme Court rounded off the legal basis of its decision by stating that: ‘[o]ur conclusions in this case are strengthened by some norms developed in the realm of international law’.<sup>116</sup> In addition to citing extensively from the United Nations Declaration on the Rights of Mentally Retarded Persons 1971, the Court recalled that: ‘India has ratified the [CRPD] on October 1, 2007 and the contents of the same are binding on our legal system’.<sup>117</sup> Whilst the Court made no further reference to the CRPD, two things are pertinent to note. First, despite the fact that the Supreme Court did not refer to the CRPD’s understanding of legal capacity, its strong view that the opinions of disabled persons cannot be simply obliterated on the thin basis of promoting their ‘best interests’ charts a different course than the traditional view of disabled persons as in need of protection by the state. The significance of introducing this thinking in Indian jurisprudence cannot be overstated. Even though the Court does not directly refer to the CRPD’s language or provisions, the fact that its interpretation is CRPD-consistent breaks away from the existing welfare-model of disability laws in India, and makes the general reference to the CRPD a significant one.<sup>118</sup> Secondly, *Suchita Srivastava*’s framing of the way in which international law is made applicable is different from cases like *Ranjit Rajak* which made use of the CRPD as *the* legal basis of the claim upon which the Court pronounced the decision. In *Suchita Srivastava*, the Supreme Court cites the CRPD to bolster the conclusion it reaches, especially, one which favours an expansive interpretation of rights; this is distinct from the mere citation referred to in the previous section, in that it cites the position in international law as both binding and having been given effect to through the broad interpretation given to rights of the disabled woman in the case. In light of the previous point, the CRPD-

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<sup>115</sup> Ibid [19]-[20].

<sup>116</sup> Ibid [25].

<sup>117</sup> Ibid [26].

<sup>118</sup> Cf Ajey Sangai, ‘Promise of Reproductive Autonomy: Does Suchita Srivastava Walk the Talk?’ (2011) 6 NALSAR Student Law Review 46, 53-55. Sangai argues that the distinction between mental retardation and mental illness is however not compatible with the social model of disability and concepts of legal capacity and supported decision making enshrined in the CRPD.

compliant interpretation in *Suchita Srivastava* elevates the reference to one which inspires and supports the Court's reasoning.

This trend has continued since and can likely to assist the interpretation and implementation of the new RPD Act 2016 in a significant way. The landmark decision *Jeeja Ghosh v Union of India*<sup>119</sup> decided by the Supreme Court in May 2016 maps the pattern of interpretation charted in *Suchita Srivastava*. The case involved a complaint by a leading disability rights campaigner, Jeeja Ghosh, for being de-boarded from a flight on the instructions of the pilot. The decision to de-board was made without consultation and based solely on the basis of the Petitioner's disability (cerebral palsy). She claimed this to be in violation of Civil Aviation Requirements of 2008 which had recognized the principles of non-discrimination and access for persons with disabilities in the context of air travel. The Supreme Court, in finding for the Petitioner, specifically cited Articles 5 and 9 of the CRPD.<sup>120</sup> It went on to find these provisions directly applicable on the basis that:

The Vienna Convention on the Law of Treaties, 1963 requires India's internal legislation to comply with international commitments. Article 27 states that a "State party... may not invoke the provisions of its internal law as justification for its failure to perform a treaty."<sup>121</sup>

Based on this the Supreme Court provided an elaborate account of the change of discourse on disability rights from a welfare to human rights model since the CRPD.<sup>122</sup> It emphasized that it was this shift from sympathy to equality which, though formally recognized, has not been actually realized in India. Jeeja Ghosh's treatment was one marked by continued ignorance about disabilities like cerebral palsy. It thus found the lack of sensitivity of the airline pilot and crew not only illegal but decrying the constitutional and CRPD obligations based on human dignity.<sup>123</sup> In one of its strongest and clearest statements on the CRPD, the judges proclaimed:

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<sup>119</sup> AIR 2016 SC 2393 (Supreme Court of India).

<sup>120</sup> Ibid [11]-[12].

<sup>121</sup> Ibid [13].

<sup>122</sup> Ibid [39]-[42].

<sup>123</sup> Ibid [36]-38].

All the rights conferred upon [persons with disabilities] send an eloquent message that there is no question of sympathising with such persons and extending them medical or other help. They are also human beings and they have to grow as normal persons and are to be extended all facilities in this behalf. The subject of the rights of persons with disabilities should be approached from human rights perspective, which recognised that persons with disabilities were entitled to enjoy the full range of internationally guaranteed rights and freedoms without discrimination on the ground of disability.<sup>124</sup>

High Courts too have maintained a progressive record of applying the CRPD. In *R Parthiban v State of Tamil Nadu*,<sup>125</sup> the High Court of Madras drew upon international commitments to bolster the conclusion it reached in favour of a reservation in employment (a quota) for disabled persons by referring to the international commitment made by India and thus making it a ground of relief alongside the statutory and constitutional basis. The Petitioner in *Parthiban* was a physics postgraduate belonging to a backward community and having post-polio residual paralysis in the left lower limbs. He was denied appointment as a physics lecturer both under the employment quota reserved for disabled persons as well as the quota for candidates belonging to recognized backward communities. He claimed that the denial was in violation of the CPRD, in addition to his Constitutional rights, the PWD Act, and the Central and State guidelines applicable in the matter.<sup>126</sup> The Court found that the Respondent was duty bound to reserve not less than 3% of positions in every establishment for disabled persons as per the provisions of the PWD Act.<sup>127</sup> It further found that its view of mandatory ‘horizontal’ (quota) reservations based on disability which cut across ‘vertical’ caste-based reservations was one in line with India’s international commitments:

Disability has drawn the attention of the world wide community. India is a signatory to various international treaties and conventions. The State, therefore, took a policy decision to have horizontal reservation with a view to fulfil its constitutional object as also its commitment to the international community.<sup>128</sup>

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<sup>124</sup> Ibid [42].

<sup>125</sup> (2010) 4 MLJ 499 (High Court of Madras).

<sup>126</sup> Ibid [4].

<sup>127</sup> Ibid [15].

<sup>128</sup> Ibid [19].



According to the Court, the international commitment had legal force because India had signed and ratified the CRPD.<sup>129</sup> It further explained that the legal force brought about a shift in the discourse on disability rights in India:

CRPD is the first comprehensive human rights treaty of the 21st century and though it does not create any new right for persons with disabilities, it seeks to contextualize existing rights for the specific circumstances of persons with disabilities. Apart from universal fundamental rights like equality, non-discrimination, life, liberty, the Convention covers a number of key areas of life that are critical to persons with disabilities such as accessibility, personal mobility, health, education, employment, habitation and rehabilitation, participation in political life. *The Convention marks a shift in viewing disability from a social welfare concern to a human rights issue, which involves acknowledging that societal barriers and prejudices are themselves disabling.*<sup>130</sup>

Citing Article 24 on the right to education as the ‘core’ of the CRPD, the Court identified four ‘salient features’ of the CRPD as:

(1) the shift in the paradigm of disability rights from one of welfare to one of human rights agenda; (2) the mainstreaming of intellectual and mental disabilities within the disability scheme and with other citizens; (3) it is an undivided package of rights - i.e. health rights are not delinked from economic, civil and other rights; (4) All disabled persons have the capability to exercise their rights because the CRPD grants them equality of legal capacity irrespective of their mental capacity.<sup>131</sup>

This shift in discourse on disability rights brought about by the CRPD compelled the Court to proclaim that: ‘on this ground also, the Petitioner herein is entitled for the relief sought for’.<sup>132</sup> Thus, the change in the way disability rights operate after the CRPD became inspirational and legally binding for the Court to enforce. Again, like *Suchita Srivastava* and *Jeeja Ghosh*, whilst the Court in *Parthiban* also did not rely on any specific provision (other than quoting Article 24), the general tenor (‘object and purpose’) of the CRPD was itself considered sufficient in providing legal guidance to the Court.

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<sup>129</sup> Ibid [23].

<sup>130</sup> Ibid [24] (emphasis supplied).

<sup>131</sup> Ibid.

<sup>132</sup> Ibid [25].

This approach is also visible in *National Association of the Deaf v Union of India*.<sup>133</sup> In light of the vast statistic of over 63 million hearing impaired people and 10 to 25 million using sign language,<sup>134</sup> the petition in this case sought to address the overall availability and quality of sign language to assist deaf people in accessing public life in India. In particular, the Petitioners prayed for the training and appointment of an adequate number of sign language interpreters and trained personnel, such as disability commissioners, at all points of interface of disabled persons with government services like airport, banks etc. The Court allowed the petition and ordered a host of directions for the Government to enforce in relation to the assessment for need, training and appointment of sign language interpreters. In a rather brief judgment which does not rely on any other statutory or constitutional basis other than Article 21 of the Constitution, the Court's only conceptual and legal reference for a broad interpretation of disabled rights seems to stem from this statement:

The [CRPD] adopted by the General Assembly and ratified by the Govt. of India on 1st October, 2007 also provides for taking appropriate measures to provide forms of live assistance and intermediaries including guides, readers and professional Sign Language Interpreters to facilitate accessibility to buildings and other facilities open to the public. *Needless to state that all the said rights are composite part of life enshrined in Article 21 of the Constitution of India.*<sup>135</sup>

The High Court of Delhi thus fed into the longstanding tradition of reading Article 21 in the most expansive way; but what is interesting to note is that the acceptable limits of expansiveness of the constitutional right under Article 21 in relation to disabled persons, were informed by the general tenor or 'object and purpose' of the CRPD, which had not been fully implemented then by India.<sup>136</sup>

Besides using the CRPD to fortify the constitutional right to life under Article 21, courts may draw upon the CRPD as the legal basis when giving a broad reading to statutory rights, especially under the PWD Act. For example in *V Palani v Management of Metropolitan Transport*

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<sup>133</sup> Writ Petition (Civil) No. 6250 of 2010 (decided on 24 November 2011) (High Court of Delhi).

<sup>134</sup> Ibid [3].

<sup>135</sup> Ibid [7] (emphasis added).

<sup>136</sup> Article 18, VCLT.

*Corporation (Chennai) Ltd*<sup>137</sup> the Madras High Court enforced Section 47 of the PWD Act to grant pay protection with continuity of service, back wages and other attendant benefits from the date of dismissal of the Petitioner by referring to and relying upon a slew of CRPD provisions including Articles 4(d), 15(2), 17, 2(i), 2(j), 2(k), 2(m), 2(o), 2(p), 2(t), 2(w). In a very brief order, the Court does not overtly articulate its approach for enforcing the CRPD, but it is clear that the bulk of the CRPD references feed into the court's favourable stance towards broadly interpreting an otherwise sparse Section 47 of PWD Act on non-discrimination in government employment. There is reason to hope that such CRPD-inspired reasoning will continue to define interpretation of Chapter IV of the new RPD Act 2016 concerning skill development and employment obligations of the State.

## **5. Implications of Judicial Engagement with the CRPD**

The analysis in Section 4 reveals three distinct implications of the evolution of disability case law since India ratified the CRPD—first, the ways in which the CRPD has been interpreted; secondly, the constitutional and statutory implications of interpreting the CRPD within the framework of fundamental rights and prevailing disability law; and lastly, the implications of India's evolving dualist position in international law on disability law. Pulling these three strands together helps understand the direction of development of judicial thought on disability rights.

### **5.1. Interpretation of the CPRD**

Within the range of progressive cases, at least three areas emerge as involving an interpretation of the CRPD in a substantive way—reasonable accommodation, education and employment.<sup>138</sup> It is useful then to summarize the precise ways in which the courts interpreted Articles 2, 24 and 27 of the CRPD.

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<sup>137</sup> Writ Petition (Civil) Nos. 1824, 2927, 3233 and 7375 of 2012 (decided 4 June 2014) (High Court of Madras).

<sup>138</sup> Also see this analysis in Gillian Parekh, *Disability, Rights Monitoring, and Social Change* (Canadian Scholars' Press 2015) 149.

### 5.1.1. Article 2

As elaborated in Section 4.2.2., *Ranjit Rajak* and *Desk Deepak* dealt with similar fact situations of denial of reasonable accommodation in employment to persons with kidney-related medical conditions. Whilst *Ranjit Rajak* elaborately drew on Article 2's definition of reasonable accommodation, especially by referring to the travaux préparatoires of the CRPD, *Desk Deepak* simply relied on *Ranjit Rajak*'s groundwork to extend the right to work with a right to be reasonably accommodated to the Petitioner. Both acknowledged that the concept of reasonable accommodation had not been developed in the context of disability law in India. Given the *Vishaka* mandate to fill in the gaps in law where no (conflicting) law exists, Article 2 was read into the relevant constitutional and statutory law on the subject. In *Ranjit Rajak*, the Court adopted the duty to reasonably accommodate as part of the right to work and livelihood under Article 21 of the Constitution.<sup>139</sup> It subjected this duty to the 'undue burden' standard found in Article 2 of the CRPD. According to the Court (on the basis of its reading of the travaux préparatoires of the CRPD), the standard adopted in the CRPD was one which had 'a nexus with the financial burden on the institution and/or undertaking which will have to bear the burden and further the extent to which reasonable accommodation can be provided for'.<sup>140</sup> This reading according to the Court 'added life and dimension to the ever expanding concept of life and its true enjoyment [under Article 21 of the Constitution]'.<sup>141</sup> What is striking is that the Court does not delve into the definition of reasonable accommodation itself but accepts the Petitioner's argument that the demand for reasonable accommodation succeeds when it satisfies the undue burden test. So when a Petitioner claims reasonable accommodation in a specific situation, the burden is cast upon the 'employer to place material before this Court to show the undue hardship that will be occasioned...[and] [i]n the absence of establishing undue hardship a direction can be issued to accommodate such a person'.<sup>142</sup> The adoption of the CRPD interpretation of Article 2 seems to have directly inspired this disability-friendly rights approach which was otherwise

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<sup>139</sup> *Ranjit Rajak* (n 79) [20].

<sup>140</sup> *Ibid* [20].

<sup>141</sup> *Ibid* [22].

<sup>142</sup> *Ibid* [25].

missing in domestic law until now. The RPD Act 2016 in Article 2(y) defines the concept of reasonable accommodation as ‘necessary and appropriate modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others.’ Given that undue burden still remains an elusive concept, cases like *Ranjit Rajak* and *Desk Deepak* provide instructive lessons and groundwork in implementing the RPD Act 2016.

### 5.1.2. Article 24

In relation to the right to education, the specificity of the meaning of the right for persons with disabilities under Article 24 of the CRPD provides greater and contextual depth to a right which is otherwise widely recognized under the Constitution (Article 21-A), legislation (Sections 30 and 32 of the PWD Act and the RTE Act) and in case law.<sup>143</sup> A substantial number of six cases (*Pramod Arora*, *Social Jurist*, *Dr Syed, Lalit*, *Sambhavna* and *Parthiban*) showed how the CPRD formulation has given conceptual direction for realizing the right to education because of the clear articulation of the package of rights which are to be available for disabled persons. As discussed in the previous section, whilst most courts simply relied on the text of Article 24 to give a broad interpretation to education-related claims, *Lalit* stands out in its substantive reliance and engagement with Article 24. In comparison with the duty-based legislative provisions on education incorporated in the RPD Act 2016, *Lalit*’s rights-based analysis appears transformative and thus may continue to steer the realisation of the general constitutional right under Article 21-A specifically for disabled persons.

*Lalit* exemplifies a classic conflict of rights situation where the disabled Petitioners seek to enforce their right to housing in the institution they live in against the right to education and housing of younger disabled residents at the institution.<sup>144</sup> In balancing the competing interests, given the paucity of resources, the Court seems to have given more weight to the housing claim of those residents who were receiving education at the

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<sup>143</sup> See esp *Unnikrishnan JP v State of Andhra Pradesh* (1993) 1 SCC 645 (Supreme Court of India); *Mohini Jain v State of Karnataka* AIR 1992 SC 1858 (Supreme Court of India).

<sup>144</sup> *Lalit* (n 95) [19].

institution than those who already had completed theirs. In framing the issue as one of education and not housing rights per se, the Court found that younger residents in state run-institutions had a right to shelter and decent living as ‘an inalienable facet of right to education itself’.<sup>145</sup> Given that this facet of the right to education was not otherwise developed in domestic disability jurisprudence, the CRPD became the mainstay for according priority to the rights of younger disabled residents. This decision was further guided by Article 7 which set out the obligations of States towards children with disabilities and Article 9 which obliged the States to take appropriate measures to ensure access to ‘schools, housing, medical facilities’ and Article 24 on right to education.<sup>146</sup> It was in reference to these provisions that the Court resolved the intersecting context of disability, children, housing and educational needs by holding that: ‘in the context of a disabled child housed in a state-run institution there are a cluster of laws and a bouquet of rights, all of which can be traced to the fundamental rights to liberty and life with dignity’.<sup>147</sup> Thus, in the final analysis, the Court sought to address the ‘cascading effect of multiple disadvantages’ of a resident ‘as a person, as a young person, a disabled young person, a disabled young person’ who is ‘doubly disadvantaged’ by addressing the deprivation of housing as a barrier to access education.<sup>148</sup> In this way, the CRPD’s enunciation of the right to education along with the rights of children and the right to access to housing in the context of disability, provided a methodical conspectus to the court for addressing the competing interests in a meaningful way.

### 5.1.3. Article 27

The seven cases concerning employment (*Shrirang, M Venkateswarlu, Murugan, Ranjit Rajak, Parthiban, Akbari Kaushik, Desh Deepak*) rely, either directly or indirectly, on Article 27 of the CRPD for adding conceptual force to Chapter VI (‘employment’) and Section 47 (‘non-discrimination in government employment’) of the PWD Act by recognizing and applying concepts like reasonable accommodation at the workplace, accessibility to general technical and vocational programmes,

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<sup>145</sup> Ibid [17].

<sup>146</sup> Ibid [14].

<sup>147</sup> Ibid [16].

<sup>148</sup> Ibid [17].

equality and non-discrimination in conditions of recruitment and continuance of employment. These concepts were either absent or sparsely developed in municipal law until RPD Act 2016. Five cases — *Shrirang*, *M Venkateswarlu*, *Murugan*, *Ranjit Rajak* and *Desk Deepak* apply Article 27 substantively; while the Petitioner in *Akbari Kaushik* cited Article 27 in obtaining relief under the PWD Act in light of these concepts.

In *Ranjit Rajak*, the Court quoted in full Article 27 of the CRPD on work and employment.<sup>149</sup> As discussed above, the case heavily drew upon the CRPD understanding of reasonable accommodation adopted in Article 2 given the lack of informative disability jurisprudence on reasonable accommodation in India. The case, involving denial of employment to the Petitioner based on the history of a kidney transplant, was argued on the basis of equality and public employment under Articles 14 and 16(1) of the Constitution which was claimed to be a denial of ‘an opportunity to earn a livelihood’ considered to be a part of right to life.<sup>150</sup> The Court noted that employment for ‘persons with medical disabilities’ was not covered under the prevailing disability law, the PWD Act.<sup>151</sup> Given this fact, and applying the settled law per *Vishaka*, the Court found that the right to livelihood of disabled persons was also part of Article 21 since India had ratified the CRPD:

In the absence of Municipal law, the [CRPD] can be read into Article 21 as it does not in any way conflict with our Municipal law as the State shall secure that men and women have the right to adequate means of livelihood within its economic capacity.<sup>152</sup>

This manoeuvre enabled the Court to delve into the standard of reasonable accommodation to be provided in employment. Reading in Article 27 of the CRPD as part of the constitutional right to life under Article 21 thus became the key to enforcing the requirement of reasonable accommodation not simply as a matter of right to equality (Article 14) or right to public employment (Article 16) or right to life (Article 21) but more specifically within the framework of the right to

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<sup>149</sup> *Ranjit Rajak* (n 79) [14].

<sup>150</sup> *Ibid* [13].

<sup>151</sup> *Ibid* [16].

<sup>152</sup> *Ibid* [20].

work of disabled persons as enshrined in the CRPD. The case of *Desh Deepak* further confirms that this inclination to enforce the right to work of disabled persons as a matter of Article 27 per se. In *Desh Deepak* the Court specifically relied on Article 27 to hold that an otherwise competent person cannot be denied a job simply based on her medical condition. The Court quotes Article 27(1) in full<sup>153</sup> and relies on the ‘almost identical’<sup>154</sup> case of *Ranjit Rajak*<sup>155</sup> to find that even though having a kidney transplant was not a disability listed in the PWD Act, it could not be used to justify employment discrimination.<sup>156</sup> In this way, both *Desh Deepak* and *Ranjit Rajak* extend the CRPD’s right to work to ‘persons with medical disabilities’ that are not domestically covered under the list of disabilities in the PWD Act. Both cases were centrally focussed on addressing the nature of deprivation (denial of employment) which resulted from a discriminatory treatment on the basis of a medical condition, rather than being mired in whether a medical condition should be considered a disability or not. *Shrirang* and *M Venkateswarlu* did the same in declining to limit the right to non-discrimination in employment to disabilities which were less than a certain mathematical percentage under the PWD Act. The courts have thus aligned with the social model of disability rather than the medical model, in being concerned with how a medical condition interacts with barriers (job requirements) to produce disadvantage (denial of employment). The fact that the denial was one that fell within the precincts of Article 27 aided this line of reasoning. This could be highly relevant in the application of the RPD Act 2016 especially extending the benefit of the Act to chronic illnesses not enumerated in the Schedule enlisting the protected disabilities.

As noted in Section 4.2.2., *Parthiban*’s references to the shift in discourse brought about by the CRPD also guided the enforcement of the disability related employment reservation (quota). Without citing Article 27, the Court’s overall philosophy inspired by the CRPD helped the Petitioner in challenging successfully his denial of employment as a physics lecturer. Thus, the general tenor of the CRPD may also become a guiding force for reinforcing particular rights like work and employment. In fact, the mere

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<sup>153</sup> Ibid [15].

<sup>154</sup> Ibid [18].

<sup>155</sup> Ibid [17].

<sup>156</sup> Ibid [22].



force of ratification of the CRPD provided the Court in *Murugan* with a reason to hold that the right to employment for disabled persons was a part of Article 21. Though these cases do not show an interpretive engagement with Article 27, it is clear that in the final analysis, it is the right under Article 27 which was enforced in principle. Given that no equivalent right to work for disabled persons exists other than in a limited way under the PWD Act and now the RPD Act, the right to public employment in Article 16, and the right to livelihood under Article 21, the reliance on the CRPD in these cases, especially Article 27, created a space for a self-standing expansive right to work for disabled persons in India.

## ***5.2. Constitutional and international law implications***

The analysis of the twenty-four cases reveals not a single but a host of approaches the courts have applied in engaging with the CRPD. Thus, the thematic organization of cases on the basis of ‘citation’ and ‘interpretation’ merely opened up further ways of delineating the judicial approaches. Sections 4.2.1. and 4.2.2. discursively examined the diversity of ways in which the CRPD is invoked and utilized. Besides the specific interpretive reflections of the CRPD offered in the previous sections, some overall observations remain due in understanding the effect of these approaches within international law, Indian constitutional law, rights jurisprudence, and disability discourse. This section offers some tentative thoughts on consolidating these lessons from the Indian cases.

It is useful to open with some preliminary remarks about the volume and quality of results returned in the search. It would be accurate to say that the use of the CRPD has not been massive, though it has been referred to in a modest number of cases. Given that India is a dualist country and has only recently enacted the legislation implementing the CRPD obligations as mandated by Article 253 of the Constitution, the reference to the CRPD in these cases—whether as citing or interpreting it, is no small feat.<sup>157</sup> The legislative delay made the courts ‘generally sympathetic’ to

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<sup>157</sup> See for the trend of positive judgments on disability rights even before the CRPD was ratified: Shruti Pandey, Priyanka Chirimar and Deepak D’Souza (eds), *Disability and the Law* (Human Rights Law Network 2005) and National Human Rights Commission, *Disability Manual* (2005) <<http://nhrc.nic.in/documents/Publications/NHRC-Book-Disability.pdf>> accessed 10 January 2016.

disability rights but not extremely so.<sup>158</sup> Given that gap between ratification and implementation, the reference to the CRPD seems natural when seen in light of Article 51(c) of the Constitution. Thus, the long wait for the full implementation of the CRPD and its measured invocation by the courts are two counter-balancing considerations in gauging the overall impact of the judicial use of the CRPD.

The ready citation or interpretation of the CRPD between the period of 2007 (when India ratified the CRPD) and 2016 (when India passed the RPD Act implementing the CRPD) can be seen as the fulfilment of a ‘negative duty’ which arises when a State becomes a signatory or submits instruments for ratification without fully ratifying, i.e. implementing the obligations through domestic legislation.<sup>159</sup> As Dhanda explains:

When a State party signs an international convention it undertakes that it shall not carry out any activity which is opposed to the mandate of the convention. Thus whilst ratification brings in a positive obligation signature inducts a negative duty. It would be unwise to accord no significance to this negative duty. At the very least this duty places an embargo on any other laws and policies which diminish the rights of persons with disabilities.<sup>160</sup>

This duty can be traced to Article 18(a) of the VCLT where a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed or ratified, but still not implemented a treaty in its domestic law.<sup>161</sup> Without undertaking the exercise of pinning down the exact ‘object and purpose’ of the CRPD, it is safe to say that some of the CRPD’s core concepts like the social model of disability, legal capacity,

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<sup>158</sup> Tushti Chopra, ‘Expanding the Horizons of Disability Law in India: A Study from a Human Rights Perspective’ 41 (2013) *Journal of Law, Medicine and Ethics* 813-814.

<sup>159</sup> It is useful to note that although India had ‘ratified’ the CRPD having deposited the instrument of ratification in 2007, this did not automatically mean ratification in the sense that the CRPD became part of the domestic law – a feat only accomplished after the RPD Act was passed by the Parliament in December 2016. As Dhanda explains: ‘This gap between signature and ratification [subsists] because countries differ in the approach towards ratification and in the procedure by which countries induct norms of international law into municipal law. A number of countries [like India] do not ratify a convention till they have modified all domestic laws and policies and brought them into conformity with the international convention. For these countries the deposit of the instrument of ratification is no more than a formality as they would have fulfilled all their commitments emanating from the international instruments. Other countries take stock of the domestic situation and if they believe there is nothing in the international instrument with which they have disagreement they go ahead and ratify the instrument’. Dhanda, ‘Constructing a New Human Rights Lexicon’ (n 1).

<sup>160</sup> *Ibid.*

<sup>161</sup> See Paolo Palchetti, ‘Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?’ in Enzo Cannizzaro, *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2001).

equality and non-discrimination, reasonable accommodation and accessibility, should not be plainly defeated by the courts.<sup>162</sup> The Supreme Court has also relied on Article 27 of the VCLT in *Jeeja Ghosh* to assert that India's internal legislations must comply with its international obligations.<sup>163</sup> Read along with Article 51(c) of the Indian Constitution which obliges the State to foster respect for treaty obligations, the VCLT justifies the use of the CRPD as an interpretive tool by courts to advance disability rights in consonance with India's international obligations. Thus, for example, the use of the CRPD in seminal cases like *Suchita Srivastava*, *Parthiban* and *Jeeja Ghosh* did not involve reliance on specific provisions under the CRPD, but the Courts' reference to the 'core' or 'salient features' of the CRPD demonstrates an appreciation of the paradigm shift brought about by the CRPD. It is this progressive dimension of the CPRD which is reflected in: *Suchita Srivastava* and *Jeeja Ghosh*'s understanding of legal capacity which is a breakaway from the paternalistic and welfare model of disabled rights in India; as well as *Parthiban*'s enforcement of disability-based quotas in employment as separate from caste-based quotas. Given that the legislative intent to enact a robust law has been dwindling, the judicial inclination to rely on the overall philosophy and context of the CRPD should not just be applauded for being progressive but also legally sound in appreciating the force of Article 51(c) of the Constitution and obligations under the VCLT.

It is interesting to note that the courts did not either highlight the absence of a law implementing the CRPD or put pressure on the legislature for enacting such a law but often simply proceeded with using the CRPD in the ways described above. Yet the apparent delay in enacting a new law seems to have provided an impetus to courts for applying the CRPD to enforce rights of disabled persons beyond what is guaranteed under

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<sup>162</sup> See for example the consideration of CRPD-compliant models of legal capacity and guardianship in various jurisdictions: Wayne Martin et al, 'Is the Mental Capacity Act of England and Wales Compatible with the UN Convention on the Rights of Persons with Disabilities? If not, What Next?' (2014) An Essex Autonomy Project Position Paper <<http://repository.essex.ac.uk/13624/1/EAP-Position-Paper-FINAL-copy.pdf>> accessed 10 January 2016; Volker Lipp and Julian O Winn, 'Guardianship and Autonomy: Foes or Friends?' (2011) 5 Journal of International Aging Law and Policy 41; Ron McCallum, 'The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections' (2010) Sydney Law School Legal Studies Research Paper No. 10/30 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1563883](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1563883)> accessed 10 January 2016.

<sup>163</sup> *Jeeja Ghosh* (n 119) [13].

municipal law. In a quiet but perceivable way, the courts have thus strengthened the human rights basis of disability law, moving away from the existing welfare model adopted in the PWD Act and thus already laying down a strong basis for the interpretation and implementation of the RPD Act. Thus, cases like *Ranjit Rajak*, *Desh Deepak Dhamija* and *National Association of the Deaf* upheld the Petitioners' claims by using the CRPD to broaden the scope of domestic provisions. The key to the judicial preference for transformative interpretation in these cases is Article 21 of the Constitution. The right to life enshrined in Article 21 plays a special role in rights jurisprudence in India.<sup>164</sup> The Supreme Court has held that Article 21 embodies the 'most precious human right' and 'must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may...enhance the dignity of the individual and the worth of the human person'.<sup>165</sup> The scope of the sparsely worded Article 21 has thus been progressively expanded to include 'the right to live with human dignity and all that goes along with it', including: 'the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings'.<sup>166</sup> A slew of decisions have capitalized on this to include within Article 21, the right to timely emergency medical services;<sup>167</sup> the right of livelihood;<sup>168</sup> the right to free primary education;<sup>169</sup> and the right to food which included a fair and efficient Public Distribution System serving those living below the poverty line.<sup>170</sup> Thus, the vast reservoir of Article 21 jurisprudence has similarly provided an opportunity for enhancing the rights of disabled persons whether it was by reading in statutory rights expansively based on international legal commitments and Article 21 of the Constitution;<sup>171</sup> or where no statutory provision is available, by giving force to

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<sup>164</sup> See esp *Maneka Gandhi v Union of India* 1978 SCR (2) 621 (Supreme Court of India). See Nalini Kant Jha, 'Fifty Years of Human Rights Jurisprudence in India' in T S N Sastry (ed), *Fifty Years of Indian Political System* (APH Publications 2000).

<sup>165</sup> *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802 (Supreme Court of India).

<sup>166</sup> *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* AIR 1981 SC 746, 753 (Supreme Court of India).

<sup>167</sup> *Paschim Banga Khet Majoor Samity v State of West Bengal* (1996) 4 SCC 37 (Supreme Court of India).

<sup>168</sup> *Olga Tellis* (n 12).

<sup>169</sup> *Unnikrishnan* (n 143).

<sup>170</sup> *People's Union for Civil Liberties v Union of India* (2001) 5 SCALE 303 (Supreme Court of India).

<sup>171</sup> *Jolly George Varghese v Bank of Cochin* AIR 1980 SC 470 (Supreme Court of India).

international obligations via Article 21 directly.<sup>172</sup> The courts in *Social Jurist* and *Murugan* seem to have adopted the former approach in upholding the right to education under RTE Act and right to employment under the PWD Act. The courts in *Ranjit Rajak*, *Desh Deepak* and *National Association of the Deaf* preferred the latter approach to enforce the right to work and accessibility directly under the CRPD. What appears from the discussion of the cases is that wherever the statutory basis is clear, the reliance on Article 21 and the CRPD is only a matter of citation (*Social Jurist* and *Murugan*), whilst the lack of a directly applicable statutory norm provides a ready ground for relying substantively on Article 21 and the CRPD (*Ranjit Rajak*, *Desh Deepak* and *National Association of the Deaf*). In either case, Article 21 carries extraordinary weight in finding in favour of disabled persons.

The general uptake of these implications is a positive one. But considering the judgments which have used the CRPD in isolation can be misleading in understanding the full discourse on disability jurisprudence in India. This may be an obvious point but can be missed in the jubilation for strides made judicially, especially when they draw on international obligations. As Kannabiran rightly remarks in her extensive case analysis of disability-related case law:

While the case law on disability is recent and not very extensive, especially in comparison to the existing case law on the other indices of discrimination, a careful reading might foreground the theoretical/conceptual bases for the marginality of disability rights jurisprudence to the larger discussions of non-discrimination in India.<sup>173</sup>

Thus, neither the existing discourse nor and the new RPD Act, will be themselves sufficient in fully realising the CRPD. The RPD Act will have to independently make creative and liberal strides in enforcing the CRPD norms. Positive judicial engagement with the CRPD can assist this paradigm shift which will ultimately, with reinforcement, be brought about by the RPD Act.

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<sup>172</sup> *Nilabati Behera v State of Orissa* AIR 1993 SC 1960 (Supreme Court of India); *DK Basu v State of West Bengal* AIR 1997 SC 610 (Supreme Court of India); *People's Union for Civil Liberties v Union of India* AIR 1997 SC 1203 (Supreme Court of India).

<sup>173</sup> Kannabiran, *Tools of Justice* (n 33) 49.

## 6. Conclusion

This chapter has examined the judicial engagement of Indian appellate courts with the CRPD. The analysis of the twenty-eight cases presents a diverse array of approaches. Delineating them as instances of ‘citation’ and ‘interpretation’ explains two broad ways of either just mentioning the CRPD or interpreting it substantively in the judicial reasoning. Within these two themes there are specific ways in which citation or interpretation is done. Given the diversity of ways in which the CRPD has been invoked, coupled with the fact that the reasons for its invocation are not usually made apparent in the text of the judgments, no single consensus can be reached on when an international treaty (or the CRPD specifically) can be invoked and in what way. But the high success rate in cases where the CRPD was used and disabled persons obtained relief, indicates a favourable disposition to both international law as in the CRPD (which has only recently been enforced via a domestic legislation – the RPD Act 2016) and disability-friendly norms. But compared against the fact that the social model of disability and a human rights framework for disability rights are still not widely embraced, the success of these handful cases may be exceptional. Thus, the overall picture which emerges is a complex one: that the strides of Indian courts in using the CRPD are notable but must be seen in the light of the context wherein the CRPD model of disability rights had *not* been fully adopted in the country. Even so, now that the new law implementing the CRPD has been passed, the transformative judicial reasoning since 2007 – when India ratified the CRPD – appears to already have laid down substantial support for securing a strong legal foothold for realising the CRPD in India. It is then potential of the judicial work between 2007-2016 which we must continue to exploit as much as appreciate.